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U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
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Re: Index No. CERCLA-O2- 2018-2015

Dear Ms. Kivowitz:

On behalf of Island Transportation Corporation ("ITC"), please accept this in response to the Environmental Protection Agency's ("EPA") March 22, 2018 letter and Administrative Order for a Remedial Design Index No. CERCLA-O2-2018-2015: New Cassel/Hicksville Groundwater Contamination Superfund Site, OU1 ("UAO"). Pursuant to Paragraph 49 of the UAO, EPA requires ITC to "notify EPA in writing of [ITC's] intent with regard to compliance" with the UAO within three days of its Effective Date. Pursuant to the April 19, 2018 letter from Gerald Burke, the Effective Date of the UAO was April 30, 2018 and the date by which ITC had to provide notice of its intent to comply was May 3, 2018. On April 30, 2018, Sharon Kivowitz advised that the Effective Date was stayed pending EPA's consideration of the comments regarding the UAO. On May 17, 2018, EPA issued a response to those comments ("May Response") and set the Effective Date of the UAO as May 21, 2018. ITC was to give its notice of intent to comply by May 24, 2018. For the reason set forth below and previously, ITC has a good faith and objectively reasonable belief that the UAO is both invalid and inapplicable to it and it does not intend to comply.

Nothing in this letter shall be construed to limit ITC's rights, claims and/or defenses that it may have against EPA, any party complying with the UAO, any party not complying with the UAO, or in any future action. This includes any claims or defenses that the UAO's requirements are not lawful or in compliance with the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. ("CERCLA"); the National Contingency Plan ("NCP"), 40 C.F.R. 300 et seq.; legally applicable and relevant and appropriate requirements ("ARARs"); and/or any relevant guidance. Furthermore, nothing in this letter shall be construed as an admission or concession of any factual allegation or legal conclusion set forth in the UAO. ITC also reserves the right to seek contribution, indemnification and/or reimbursement pursuant to CERCLA.

I. History of Negotiations Between EPA and ITC

EPA issued the Record of Decision ("ROD") for this site on or about September 30, 2013. Even before EPA issued the ROD, ITC, together with other parties, submitted comments and concerns about data upon which EPA was relying, the absence of other data that EPA should have considered, the Conceptual Site Model ("CSM"), and the remedy selected. (Gradient Report September 23, 2013) EPA chose to ignore those comments and instead issued the ROD just days after receiving the comments.

Since then, ITC has participated in multiple in-person and telephonic meetings with EPA and its personnel. It has also participated in meetings with EPA's convener David Batson. ITC has also submitted numerous comments to EPA's various drafts of Consent Orders and proposed scopes of work for OU1, individually or in conjunction with IMC Eastern Corporation ("IMC"). Most recently, on April 25, 2018 ITC, together with IMC, submitted comments to the UAO ("UAO Comments"), to which the majority, if not all, of the prior comments were appended, including technical comments from Gradient Corp.[1] ITC incorporates all of these prior comments by reference.

ITC has spent considerable resources negotiating with EPA regarding the terms of any Consent Order, the scope of any investigation and the selection of an appropriate response. ITC did so because any investigation/response to OU1 must comport with the actual site conditions, sound hydrogeological principles and cost-effective techniques.

Despite ITC's good faith efforts, EPA rejected virtually all of the comments submitted on behalf of ITC and/or IMC, including those submitted in response to the UAO. It also rejected most of the revisions to the various drafts of the Consent Order and Scopes of Work and rejected the comments submitted in response to the UAO. In other words, EPA has rebuffed ITC's good faith efforts.

II. ITC's Sufficient Cause Defenses

In paragraph 50 of the UAO, EPA purports to require ITC to "describe, using facts that exist as of such notification, any 'sufficient cause' defenses asserted" by ITC, citing to 42 U.S.C. §9606(a) and §9607(c)(3). EPA is not authorized under CERCLA to require a respondent to a UAO to describe the respondent's sufficient cause defenses. Nor is EPA authorized to limit those sufficient cause defenses to the facts that exist as of the date of the response. Accordingly, ITC objects to this requirement and reserves the right to raise any sufficient cause defense and to rely

[1] Capitalized terms used, but not defined herein, shall have the same meaning as the same terms used in the UAO Comments.

upon any information in support of same, regardless of whether it is included in this letter or currently known to ITC.

A respondent is not subject to treble damages or civil penalties under CERCLA if the respondent has "sufficient cause" to not comply with the UAO. Courts have held that "sufficient cause" under CERCLA means a "good faith" or "objectively reasonable basis for believing that EPA's order was either invalid or inapplicable to" the respondent. Emhart Indus. v. New Eng. Container Co., 274 F. Supp.3d 30, 80 (D.R.I. 2017). See also Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987); General Elec. Co. v. Jackson, 610 F.3d 110, 119 (D.C. Cir. 2010); Emp'rs Ins. Of Wausau v. Browner, 52 F.3d 656, 661 (7th Cir. 1995). As set forth below, ITC has a good faith and objectively reasonable basis for believing the UAO is invalid and inapplicable to it.

1. ITC Has Sufficient Cause Because It Should Not Be Considered A Responsible Party.

EPA alleges that ITC is liable under Section 107(a)(2) of CERCLA as an operator of a facility at 299 Main Street, Westbury, New York ("Facility"). (UAO ¶37) ITC is not now and never was the owner of the 299 Main Street facility. Moreover, there were many operators at the Facility. Yet, EPA failed to identify the owner or any other alleged operator at the Facility in the UAO.

EPA further alleges that ITC disposed of trichloroethylene ("TCE") while operating at the Facility. Leaving aside the fact that there is no evidence that ITC spilled or released TCE or any other volatile organic compound ("VOC"), the data demonstrates that the VOC concentrations were higher entering 299 Main Street than they were exiting. See Final Focussed (sic) Remedial Investigation Report, September 2000, p. 41; Draft IRM Work Plan, October 2001, pp. 15-16. See Supplemental Investigation Report for Pollution Source PS-10, October 26, 2001, p. 3.

This is entirely consistent with the rest of data to which EPA has access. It is also consistent with the conclusions of the New York State Department of Environmental Conservation ("NYSDEC"). ITC has not contributed any contamination to OU1. Furthermore, to the extent that any Western Plume actually exists, which ITC disputes, the plume is small, shallow, flows southwesterly and has had minimal, if any, impact on EPA's OU1. In short, ITC is not responsible for any contamination for which remediation would be necessary or for which there exists a complete pathway for human exposure. Thus, ITC is not a responsible party and the UAO is inapplicable to it.

2. ITC Has Sufficient Cause Because The UAO Is Arbitrary And Not In Accordance With The Law.

Together with IMC, ITC has submitted comments to EPA on nine occasions; the most recent being April 25, 2018. The majority of those comments were accompanied by technical

memoranda, detailing the many flaws in EPA's approach to the Site. EPA consistently refused to substantively address any of the concerns raised, including those set forth in the April 25, 2018 correspondence. Instead, EPA simply declares its disagreement with the comments and cherry-picks some data that it believes supports its position. Although EPA has the April 25, 2018 correspondence, set forth below is a brief recap of ITC's sufficient cause defenses. The April 25, 2018 letter and its appendices are included by reference.

A. EPA's Remedial Design Does Not Comply With the NCP.

EPA did not conduct a Remedial Investigation ("RI") for OU1. Instead, it retained Lockheed Martin Technology Services ("Lockheed") to review the existing data and to recommend additional data that was necessary to fill gaps in the knowledge of the Site. In its May Response, EPA claimed that it did not have to complete a proper RI because the "operable unit 1 ("OU1") had been studied for years, and sufficient data was available to define the nature and extent of the contamination in OU1…" Specifically EPA cited the "investigative efforts" of NYSDEC.

Yet, later in the May Response (and in the same section), to justify is failure to consider all of the available data, EPA claims that "[h]istorical data collected from within the NCIA would neither be reflective of current condition within OU1, nor would they be reflective of the NYDEC's response activities within the NCIA to mitigate the migration of contamination to OU1" (p. 3) It appears that EPA is claiming that it relied on the existence of the historic data as justification for not fully investigating OU1 or performing an RI, but then ignored the very same data in preparing the Site Conceptual Model and the ROD. EPA's selective reliance on data to advance its position is by definition arbitrary.

EPA then ignored Lockheed's recommendation regarding the existing data gaps and simply deemed Lockheed's analysis regarding those gaps to be a "Supplemental RI". EPA then failed to complete the additional sampling recommended in the "Supplemental RI" and ignored the Upgradient Parties' contribution to OU1. EPA then purported to complete a human health risk assessment and Feasibility Study ("FS") in just a few days without addressing these deficiencies.

In its May Response, EPA claims that ITC has misconstrued Lockheed's recommendation and that in reality Lockheed was simply indicating that additional wells should be installed as part of future remedial activities. While Lockheed did refer to monitoring future remedial activities, it also stated that the wells would "aid in monitoring the vertical and horizontal extents" of the plumes. Thus, the additional wells were not simply for the design of the remedy. Furthermore, Lockheed noted that EPA needed to evaluate the "high molar fraction of TCE in the lower portion of the NCIA off-property Eastern Plume", which is something that ITC and IMC have been stating consistently. That is directly tied to Lockheed's statement that the southern and western extent of the Upgradient Plume had yet to be evaluated. (SRI pp. 22-23)

EPA's statement that it has sufficient information regarding the Upgradient Plume's contribution to OU1 it will inform the appropriate parties misses the point. EPA's entire approach to OU1 has been to ignore and/or limit its consideration of relevant data to ensure that it can claim that it does not have sufficient information to evaluate the Upgradient Plume's contribution on OU1.

Additionally, EPA failed to adequately characterize the groundwater plumes. This is apparent in the differing plume depictions set forth in the Supplemental RI and the FS, even though these documents purport to be based on the same data and were prepared at essentially the same time. In its May Response, EPA claims that comparison of the plume depictions in the two reports is not meaningful because the "RI was intended to develop the Site CSM using available data and to make recommendations for future activities at the Site", while the FS was only intended to evaluate remedial alternatives for a discretion portion (i.e. OU1) of the overall Site." (pp. 2-3) This makes little sense. OU1 is part of the overall Site. The RI contained two separate iso-concentration contours maps--one for TCE and one for PCE—purporting to depict concentrations at 100 µg/L—for OU1 as well as other parts of the Site. The FS purports to depict the same information but for just OU1. Therefore, while there may be additional information on the depictions in the two reports, the information for OU1, including the plume depictions, should be the same for the same concentrations and depths.

Finally, EPA refused to consider thousands of groundwater samples from the Site and from the Upgradient Parties, even after IMC offered to provide the entire data set to EPA. EPA arbitrarily chose to ignore relevant data and the absence of same. As set forth above, EPA's decisions about what data to rely on, when and for what purpose are contradictory and arbitrary.

EPA's failure to perform an RI, failure to adequately characterize the Site as required to prepare as FS and failure to consider all of the relevant data are inconsistent with the NCP.

B. EPA's CSM Is Fatally Flawed.

Because EPA failed to properly characterize the Site and failed to gather and review the necessary data, its CSM is fundamentally flawed. The CSM ignores the southwesterly lateral migration and the downward vertical migration of the Eastern Plume within OU1. It also fails to address (including failing to propose collecting related data) the comingling of the Eastern and Central Plumes and the contribution from upgradient sources. EPA failure to address these issues is inexplicable because the existing data confirm both the directionality of the Eastern Plume and the upgradient contribution.

In its May Response, EPA claims that "Respondents can request to drill deeper and/or install additional monitoring wells in an effort to provide the necessary data to support their assertion." (p. 4) This statement ignores what ITC and IMC have conveyed to EPA, which is

that other Respondents have categorically refused to allow such additional sampling under any circumstances. Thus, EPA's statement is simply wrong,

EPA then goes on to say that it disagrees that the Eastern and Central Plumes are comingled to together or with the Upgradient Plume. Respectfully, the plume depictions in the RI demonstrate that comingling with the Upgradient Plume is highly likely. Furthermore, the RI indicated that EPA needed to determine the southern and western edges of the Upgradient Plume and evaluate the high molar fraction of TCE in the Eastern Plume (as Gradient has done) because of the potential for comingling. Given that EPA has not undertaken that work, its "disagreement" with ITC and IMC on the issue of comingling is not based in fact.

Even EPA's own recent data collected from OU3 confirm that EPA's CSM is wrong. This data demonstrate that the Eastern Plume and the Upgradient Parties' contributions to OU1 are much more extensive than depicted by EPA. EPA's recent data also confirm that the OU1 Plume(s) migration contains a southwesterly component, contrary to EPA's depictions. EPA's claim that the impacts along the western edge of OU3 are somehow linked to the OU1 Western Plume is not supported by the data—including the historical data that EPA chose to rely upon on page 5 of its May Response and the data that EPA chose to ignore.

The CSM incorrectly attributes the contamination in the western portion of OU1 to ITC, IMC and other Western Plume parties. The data from the NYSDEC demonstrate that the NCIA Western Plume was shallow, attenuated rapidly at depth and never migrated south of Old Country Road –the boundary of the Site that NYSDEC was investigating. Moreover, to the extent that there was any historic contamination associated with any of the Western Plume parties, it has been remediated. EPA's May Response is another example of its "selective" use of data. EPA relies on data from 1999 and 2000, without acknowledging that what ITC and IMC said was that source remediation began around 2004 and the remediation of what was the Western Plume was largely complete by 2011, as NYSDEC acknowledged. Once again, EPA's refusal to look at all of the data, instead of just selecting data that supports its agenda has led EPA to the wrong conclusion. EPA's attribution of the western edge of the plume in OU1 to ITC or other Western Plume parties is incorrect and contrary to the data. For these reasons, EPA's "promise" to take action "if [it] determines that sufficient information exists to identify additional sources of groundwater contamination to OU1", is not sufficient.

Finally, EPA did not provide for collection of data to address the aforementioned data gaps—even as part of the PreDesign Investigation ("PDI") or the UAO. During negotiations, ITC and IMC proposed additional sampling to ascertain the western extend of the Eastern Plume. Not only did the Eastern Plume parties reject ITC's proposal, EPA failed to include the recommendation in its scope of work.

As a result of the multiple significant errors in the CSM and EPA's depiction of the Site, the CSM cannot result in an efficient and effective remedy.

C. EPA Did Not Select A Remedy That Is Compliant With the NCP.

EPA's remedy is not consistent with the NCP because it is based upon inadequate Site characterization and an erroneous CSM. EPA has proposed in-well vapor stripping, despite the fact that at least two consultants and the NYSDEC have already confirmed that it is not an effective or appropriate remedy at the Site due to its horizontal and vertical permeability of the soil.

ITC and IMC have repeatedly raised these issues with EPA, but EPA has failed to engage substantively with respect to any issue. Even in its May Response, EPA states that it acknowledged the difficulties that may be encountered as if merely acknowledging the difficulties is sufficient. Pairing one remedial technology, which is clearly insufficient, with a second remedial technology is obviously not as efficient or effective as simply selecting an adequate remedy in the first place. Seeking to compel the Respondents to spend significant funds confirming what all involved already know is not compliant with the NCP.

EPA has continued to arbitrarily select the data on which it chooses to rely, to ignore data that is inconsistent with its position and to fail to address blatant gaps in the data. As a result the UAO which seeks to compel ITC to remediate contamination for which it is clearly not responsible using a remedy that is not efficient or effective or consistent with the universe of data. This can only be described as arbitrary.

D. ITC's Liability, If Any, Is Divisible.

The UAO purports to hold the respondents identified with a particular plume jointly and severally liable to perform work specific to that plume and jointly and severally liable to perform so-called "Common Work Elements". (UAO ¶54) As set forth above, ITC does not believe that any contamination has emanated from the Facility specifically, or the Western Plum, generally, has otherwise impacted OU1. Therefore, any share of liability ascribed to ITC (and there should be none) is divisible.[2]

E. EPA Has Failed To Treat ITC As A De Minimis Party.

CERCLA contains exemptions for de minimis parties. 42 U.S.C. §9612(g). As set forth above, there is no evidence that ITC was responsible for any contamination within OU1. Despite this EPA has refused to engage in good faith negotiations regarding a de minimis settlement with ITC. It has also failed to take into account ITC's inability to meet EPA's financial assurances.

[2] EPA seems to believe that ITC's divisibility argument is undermined by its position that the plumes are comingled. Respectfully, EPA seems to misunderstand both positions.

EPA's repeated failure to consider all of the available data, including that of the Upgradient Parties, while refusing to address the gaps in its own data is not an oversite. It appears to be part of intentional effort by EPA to force an unsupported and a failed remedy upon a particular group of respondents while minimizing or ignoring completely the contribution of other parties who are actually responsible for the contamination. EPA's decisions are not based upon the facts or science surrounding the Site. For all of the reasons set forth herein and the reasons set forth in April 25, 2018 letter from IMC and ITC and the appendices, ITC cannot comply with the UAO; it is invalid and inapplicable to it. It does remain willing to discuss the within issues with the EPA.

This letter is subject to and without waiver of ITC's defenses and/or claims and is not an admission of liability or responsibility.

If you have any questions, please feel free to contact me.

Very truly yours,

Sheila Woolson